

RECONCILING THE DEFINITIONS OF SURFACE WATERS AND WETLANDS IN RSA 485-A and RSA 482-A

SUMMARY

The definition of “surface waters” and “wetlands” are inconsistent between RSA 485-A (which deals with surface water quality standards and related permits) and RSA 482-A (which deals with wetlands and related permits). Together, RSA 485-A:8 to 12 and rules Env-Wq 1700 comprise New Hampshire surface water quality standards (WQS). RSA 485-A has a definition for “surface waters of the state”, whereas Env-Wq 1700 has a different definition for “surface waters” and adopts the RSA 482-A definition for wetlands. RSA 482-A (the statute governing wetlands permitting) has a definition for wetlands, and defines the “waters of the state” to which the wetlands statute applies. Env-Wt 100-800 has a slightly different definition for “surface water body or surface waters”, and defines various kinds of wetlands. Further, the federal Clean Water Act (CWA), which interfaces with both WQS (via EPA approval of WQS) and wetlands programs (via the State Programmatic General Permit (SPGP) issued by the Corps of Engineers to DES), has a definition of “Waters of the United States”, and requires that the state programs’ jurisdiction include at least all Waters of the US.

Prior to the Supreme Court decision in *Rapanos v. United States*, the 1987 Corps of Engineers Wetlands Delineation Manual was the authoritative reference for identifying wetlands that are “waters of the US”. Now, the *Rapanos* decision requires that, in addition to meeting the 1987 Corps manual delineation requirements, wetlands (and other waterbody types) must also have a “significant nexus” to navigable-in-fact waters.

The purpose of this discussion paper is to make recommendations for changes to statute (primarily RSA 485-A) and rule that would make it clear to what surface waters and/or wetlands WQS apply, and also make it clear in statute that this is at least all the “waters of the US” under federal Clean Water Act jurisdiction. Another, desirable outcome is to make recommendations to change surface water and wetland definitions in WQS so that the definitions governing WQS are consistent with, if not identical to, the definitions governing wetlands permitting under RSA 482-A.

APPLICABLE LAWS AND REGULATIONS

Federal

The provisions of the Clean Water Act apply to the “navigable waters” of the United States. The Clean Water Act itself (Section 502) and subsequent federal regulations, (40 CFR 122.2) define “navigable waters” and “waters of the United States” as:

502 (7) The term “navigable waters” means the waters of the United States, including the territorial seas.

40 CFR 122.2 defines “waters of the United States” as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Section 404 of the Clean Water Act regulates dredging and filling in wetlands and other "waters of the US". This is done by the Corps of Engineers, with EPA consultation. Section 404 states that:

404 (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

The Corps of Engineers has issued the (SPGP) to DES under section 404, which means that the Corps and EPA have determined that the state wetlands permit process meets the requirements of section 404, and therefore Wetlands Permits issued by DES under state law and regulations also serve as the Corps of Engineers federal permit.

Guidance

In 1987 the Corps of Engineers published The “Corps of Engineers wetlands delineation manual, [Technical Report Y-87-1](#)”. The manual describes procedures and protocols for identifying the boundaries of wetlands that are “waters of the US”. This manual has been incorporated into DES wetland regulations by reference. The preface to the on-line edition states:

“This is an electronic version of the 1987 *Corps of Engineers Wetlands Delineation Manual* (the 1987 Manual). The 1987 Manual is the current federal delineation manual used in the Clean Water Act Section 404 regulatory program for the identification and delineation of wetlands. Except where noted in the manual, the approach requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland.”

In 2006 the US Supreme Court issued a decision, in *Rapanos v. United States and Carabel v. United States*, that Clean Water Act jurisdiction is limited to waters that have a “significant nexus” to traditional navigable waters. [EPA guidance](#) issued in December 2008 contains the following table:

Summary of Key Points
<p>The agencies will assert jurisdiction over the following waters:</p>
<ul style="list-style-type: none"> • Traditional navigable waters • Wetlands adjacent to traditional navigable waters • Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months) • Wetlands that directly abut such tributaries
<p>The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:</p>
<ul style="list-style-type: none"> • Non-navigable tributaries that are not relatively permanent • Wetlands adjacent to non-navigable tributaries that are not relatively permanent • Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary
<p>The agencies generally will not assert jurisdiction over the following features:</p>
<ul style="list-style-type: none"> • Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) • Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
<p>The agencies will apply the significant nexus standard as follows:</p>
<ul style="list-style-type: none"> • A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters • Significant nexus includes consideration of hydrologic and ecologic factors

State – RSA’s

New Hampshire state statutes (RSA 485-A, mostly RSA 485-A:8 to 11) –“Water Pollution and Waste Disposal” contain part of the WQS specified in the Clean Water Act to be adopted by states.

485-A:2 Definitions - *"Surface waters of the state" means perennial and seasonal streams, lakes, ponds, and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses, and other bodies of water, natural or artificial.*

New Hampshire state statutes (RSA 482-A) –“Dredge and Fill in Wetlands” regulate dredging and filling in state waters and pertain to the application of dredge and fill regulations outlined in the Clean Water Act.

482-A:2 X Definitions. – *"Wetlands" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.* [note: this definition is nearly identical to the federal definition]

482-A:3 Excavating and Dredging Permit; Certain Exemptions. –

I. (a) No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department.

482-A:4 Definition. – *Without limiting RSA 482-A:3, the waters and adjacent areas within this state to which this chapter applies are defined as follows:*

I. Wherever the tide ebbs and flows, this chapter shall apply to all lands submerged or flowed by mean high tide as locally determined, any sand dune or vegetation thereon in the state of New Hampshire, and, in addition, to those areas within 100 feet of the highest observable tide line which border on tidal waters, such as, but not limited to, banks, upland areas, bogs, salt marsh, swamps, meadows, flats or other lowlands subject to tidal action.

II. Wherever fresh water flows or stands and in all areas above tidal waters not included in paragraph I of this section, it shall apply (in addition to great ponds or lakes of 10 acres or more in natural area as provided for in RSA 482-A:16-20 and RSA 482-A:21-25) to those portions of great ponds or lakes created by the raising of the water level of the same, whether by public or private structure, and to all surface waters of the state as defined in RSA 485-A:2 which contain fresh water, including the portion of any bank or shore which borders such surface waters, and to any swamp or bog subject to periodical flooding by fresh water including the surrounding shore.

State – NHDES Certified Administrative Rules

DES surface water quality regulations Env-Wq 1700 contain the rest of the WQS specified in the Clean Water Act to be adopted by states. Together RSA 485-A:8-11 and Env-Wq 1700 comprise the WQS, and these have been approved by EPA as required by the Clean Water Act

Env-Wq 1700 Surface Water Quality Regulations

Env-Wq 1701.02 Applicability: (a) These rules shall apply to all surface waters.

Env-Wq 1702.46 "Surface waters" means "surface waters of the state" as defined in RSA 485-A:2, XIV and waters of the United States as defined in 40 CFR 122.2.

Env-Wq 1702.48 "Tidal waters" means those portions of the Atlantic Ocean within the jurisdiction of the state, and other surface waters subject to the rise and fall of the tide.

Env-Wq 1702.53 "Wetland" means "wetland" as defined in RSA 482-A:2, X, namely "an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Wetlands include, but are not limited to, swamps, marshes, bogs and similar areas as delineated in accordance with Env-Wt 100 et seq.

Env-Wq 1703.02 Wetlands Criteria.

(a) Subject to (b), below, wetlands shall be subject to the criteria listed in this part.

(b) Wherever the naturally occurring conditions of the wetlands are different from the criteria listed in these rules, the naturally occurring conditions shall be the applicable water quality criteria.

Env-Wt 100-800 Wetlands Rules

Env-Wt 301 provides detailed criteria for the delineation of wetlands.

Definitions in the Wetlands Rules

Env-Wt 101.10 "Bog" means a wetland distinguished by stunted evergreen trees and shrubs, peat deposits, poor drainage, and/or highly acidic soil and/or water conditions.

Env-Wt 101.41 "Flats" means relatively level landforms composed of unconsolidated mineral and organic sediments, usually mud or sand, that are alternately flooded and exposed by the tides and that usually are continuous with the shore.

Env-Wt 101.56 "Marsh" means a wetland:

(a) That is distinguished by the absence of trees and shrubs;

(b) Dominated by soft-stemmed herbaceous plants such as grasses, reeds, and sedges; and

(c) Where the water table is at or above the surface throughout the year, but can fluctuate seasonally.

Env-Wt 101.91 "Surface water body" or "surface waters" means those portions of waters of the state, as defined by RSA 482-A:4, which have standing or flowing water at or on the surface of the ground. This includes but is not limited to rivers, streams, lakes, ponds and tidal waters.

Env-Wt 101.92 "Swamp" means a wetland that is dominated by trees and/or shrubs.

Env-Wt 101.96 "Tidal wetland" means a wetland whose vegetation, hydrology or soils are influenced by periodic inundation of tidal waters.

Env- Wt 101.99 "Vernal pool" means a surface water or wetland, including an area intentionally

created for purposes of compensatory mitigation, which provides breeding habitat for amphibians and invertebrates that have adapted to the unique environments provided by such pools and which:

(a) Is not the result of on-going anthropogenic activities that are not intended to provide compensatory mitigation, including but not limited to:

- (1) Gravel pit operations in a pit that has been mined at least every other year; and*
- (2) Logging and agricultural operations conducted in accordance with all applicable New Hampshire statutes and rules; and*

(b) Typically has the following characteristics:

- (1) Cycles annually from flooded to dry conditions, although the hydroperiod, size, and shape of the pool might vary from year to year;*
- (2) Forms in a shallow depression or basin;*
- (3) Has no permanently flowing outlet;*
- (4) Holds water for at least 2 continuous months following spring ice-out;*
- (5) Lacks a viable fish population; and*
- (6) Supports one or more primary vernal pool indicators, or 3 or more secondary vernal pool indicators.*

Env-Wt 101.103 "Wetland" means "wetlands", as defined by RSA 482-A:2, X, namely "an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Wetlands include swamps, marshes, bogs and similar areas.

DISCUSSION

House Bill 1305 was requested by DES in the 2010 legislative session to revise the language in RSA 485-A:2, XI to remove ambiguity regarding the definition of "surface waters of the state" and to reconcile the definitions in RSA 485-A and water quality regulations with the definitions in RSA 482-A. Another intent of the bill was to make it clear that both WQS and wetlands statutes and rules apply, at a minimum, to all "waters of the US", so that there is correspondence with federal CWA jurisdiction. The bill, referred to interim study by the House Resources, Recreation, and Development Committee, proposed to change RSA 485 –A:2, IV to read as follows:

Explanation: Matter added to current law appears in **bold italics**.
 Matter removed from current law appears ~~[in brackets and struck through.]~~
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

XIV. "Surface waters of the state" means perennial and seasonal streams, lakes, ponds, and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, **swamps, bogs, other wetlands**, water courses, and other bodies of water, natural or artificial.

The tasks of Water Quality Standards Advisory Committee Surface Water Definition Working Group are to:

- (1) Review RSA 485-A:12, RSA 482-A:2 and the relevant definitions in DES surface water quality regulations (Env-Wq 1700) and wetlands rules (Env-Wt 100-800)
- (2) Ascertain if there are in fact inconsistencies in the definitions used to apply water quality standards
- (3) Make recommendation for any appropriate statutory language changes.

The proposed changes to RSA 485-A:2 from the 2010 legislative session will be the starting point for discussions. DES believes that the language proposed in HB 1305 may not fully remove ambiguity.